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No. 96-1137

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JAMES TANCA,
Petitioner,

v.

NILS NORDBERG, COMMISSIONER, AND THE MASSACHUSETTS DEPARTMENT OF EMPLOYMENT AND TRAINING,
Respondents.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

SCOTT HARSHBARGER
Attorney General
of Massachusetts

DOUGLAS WILKINS*
BENJAMIN ROBBINS
Assistant Attorneys General
1 Ashburton Place, Room 2019
Boston, Massachusetts 02108
(617) 727-2200
**Counsel of Record*

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Question Presented.

The respondents disagree with the petitioner's statement of the questions and submit that this case raises the following issue only:

1. In a Title VII retaliation case, does 42 U.S.C. § 2000e-2(m), applicable to cases of discrimination based on "race, color, religion, sex, or national origin," establish liability when the employer proves that it would have made the same adverse employment decision regardless of any unlawful motive?

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v.

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ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Statement of Jurisdiction.

The District Court had jurisdiction over this case under 28 U.S.C. §§ 1331 and 1343(a)(3), because the petitioner raised a "federal question" under 42 U.S.C. § 2000e-3(a) of Title VII of the Civil Rights Act of 1964. The respondents otherwise agree with the petitioner's statement of jurisdiction.

Statement of the Case.

The petitioner, James Tanca ("Tanca"), brought this employment discrimination case on April 21, 1993. He alleged that the respondents, the Massachusetts Department of Employment and Training, and its Commissioner, Nils Nordberg (collectively "DET"), retaliated against him for engaging in activity protected by Title VII of the 1964 Civil Rights Act (42 U.S.C. § 2000e *et seq.*). In particular, Tanca alleged that he was denied a promotion because he had protested prior promotions by his employer as acts of reverse racial discrimination.

On November 22, 1994, the District Court denied DET's motion for summary judgment. The parties then tried the case to a jury from January 3 through January 9, 1995. On January 10, 1995, the jury found that Tanca's protected opposition to DET's earlier promotions was a "motivating factor" in DET's decision denying Tanca a promotion in his office. The jury also found, however, that DET would have made the same decision regardless of Tanca's protected opposition.[1]

Based upon the jury's mixed-motive verdict, DET moved for judgment as a matter of law, on February 1, 1995. By order dated March 15, 1995, the District Court granted DET's motion, because (1) 42 U.S.C. § 2000e-2(m), which was added

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[1] Contrary to the representation on page 4 of Tanca's petition for certiorari, the jury never "returned a verdict in which it found for Tanca on the issue of liability."

by the 1991 Civil Rights Act to establish liability in some mixed-motive cases, did not apply to this retaliation case; and thus (2) the jury's mixed-motive finding required judgment for DET under this Court's holding in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Tanca moved for reconsideration and for a new trial on April 11, 1995, challenging the District Court's interpretation of 42 U.S.C. § 2000e-2(m). On May 10, 1995, the District Court denied these motions and reaffirmed its ruling on 42 U.S.C. § 2000e-2(m).

Tanca filed a timely notice of appeal on June 7, 1995. In a decision dated October 28, 1996, *Tanca v. Nordberg*, 98 F.3d 680 (1st Cir. 1996), Appendix ("App.") 1-15, the First Circuit affirmed the District Court's judgment, holding that 42 U.S.C. § 2000e-2(m), by its plain terms, does not apply to Title VII retaliation claims. Tanca then filed a timely petitition for certiorari with this Court, on January 17, 1997.

Argument.

I. THE ISSUE IS NOT READY FOR SUPREME COURT REVIEW, BECAUSE FEW LOWER FEDERAL COURTS HAVE MEANINGFULLY ADDRESSED THE ISSUE OF MIXED-MOTIVE LIABILITY IN RETALIATION CASES.

Tanca's principal argument in favor of granting certiorari is that some district courts have applied 42 U.S.C. § 2000e-2(m) in retaliation cases. The First Circuit has correctly noted, however, that none of the lower federal courts that have applied 42 U.S.C. § 2000e-2(m) to employment retaliation cases have "weighed the plain language of the statute prior to borrowing the provision." *Tanca v. Nordberg*, 98 F.3d at 684, App. 11. There is no "real and embarrassing conflict of opinion and authority" among the circuits in this case that would warrant certiorari. *See Rice v. Sioux City Cemetery*, 349 U.S. 70, 79 (1955) (citation omitted).

In fact, the First Circuit's decision accords with the decision in *Riess v. Dalton*, 845 F. Supp. 742 (S.D. Cal. 1993), another mixed-motive retaliation case brought under Title VII. In that case, as in the case at bar, the jury found that the employer's reprisal against the employee for his protected activity was only a motivating factor in the employer's decision to discharge him. *Riess v. Dalton,* 845 F. Supp. at 743. The jury also found that the employer would have made the same decision regardless of the retaliation. *Id.* The court in *Riess* entered judgment for the employer, because retaliation claims were "conspicuously absent" from the plain language of 42 U.S.C. § 2000e-2(m),

Id. at 744, and because the established rule under *Price Waterhouse v. Hopkins*, 490 U.S. at 244-245, excuses the mixed-motive employer from liability. *Riess*, 845 F. Supp. at 745.

With the exception of two district court cases, *Woodson v. Scott Paper Co.*, 898 F. Supp. 298 (E.D. Pa. 1995), and *Heywood v. Samaritan Health System*, 902 F. Supp. 1076 (D. Ariz. 1995), none of the cases that Tanca cites even mentions, let alone provides a reasoned analysis of, the omission of retaliation claims under 42 U.S.C. § 2000e-2(m). Petition for Cert., at 5-6, and cases cited therein.[2] *See also Doe v. Equal Employment Opportunity Comm'n*, 862 F. Supp. 1310, 1316 n.2 (E.D. Pa. 1994) (summarily applying 42 U.S.C. § 2000e-2(m) to retaliation claim brought under the Americans With

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[2] Tanca has improperly cited the unpublished decision of *Beinlich v. Curry Development, Inc.*, 54 F.3d 772, 1995 WL 311577 (4th Cir. May 22, 1995), for precedential value, when in fact the decision itself quotes from the applicable local rule of procedure that expressly disfavors such usage. *Beinlich v. Curry Development, Inc.*, 1995 WL 311577, at 1.

Moreover, Tanca can hardly cite for support the decision in *Kerr-Selgas v. American Airlines*, 858 F. Supp. 316, 319 n.2 (D.Puerto Rico 1994), *aff'd in part and vacated in part*, 69 F.3d 1205 (1st. Cir. 1995), when the First Circuit in the case at bar has explained and limited its decision in *Kerr-Selgas*. *Tanca v. Nordberg*, 98 F.3d 680, 684-685 n.8 (1st Cir. 1996), App. 11-12.

Disabilities Act).[3] Moreover, the *Woodson* and *Heywood* cases exalt supposed policy over statutory language and legislative history and, accordingly, are not likely to be persuasive when the issue is litigated at the appellate level. In the *Heywood* case, for example, the court applied 42 U.S.C. § 2000e-2(m) to a Title VII retaliation claim, even while acknowledging that "[r]etaliatory discharge is comprised in § 2000e-3(a), rather than § 2000e-2, and the specific language of the [1991] amendment, and of the House report, do *not* include retaliation." *Heywood*, 902 F. Supp. at 1081 (emphasis added). The court in *Heywood* relied instead upon its assumptions concerning the "policy articulated in the amendment and in the House report . . . ." *Id.*[4]

Even if it were proper to exalt policy over plain statutory text, the assumption of these cases that the statutory policy is uniformly pro-plaintiff has no basis in statutory text or history.

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[3] The Americans With Disabilities Act ("ADA") expressly incorporates the remedies provided under Title VII. 42 U.S.C. § 12117(a). The petitioner's reliance, however, upon the ADA case of *Pedigo v. P.A.M. Transport, Inc.*, 60 F.3d 1300 (8th Cir. 1995), is inapposite, because that case did not involve a retaliation claim. Instead, the employee sued for discrimination based on his disabled status. *Pedigo*, 60 F.3d at 1301.

[4] Nor does the Equal Employment Opportunity Commission's interpretation of 42 U.S.C. § 2000e-2(m) comport with the plain language of this provision. *EEOC: Revised Enforcement Guide on Recent Developments in Disparate Treatment Theory*, No. 778, at 7 n.14 (July 7, 1992), Fair Empl. Prac. Man. (BNA) 405:6921.

See below, at pp. 7-13. Further litigation in the circuit courts is therefore likely to resolve the issue once those courts have had the opportunity to construe the plain language of 42 U.S.C. § 2000e-2(m). In short, there is no real split of authority on the issue, when most of the cases that have applied 42 U.S.C. § 2000e-2(m) to retaliation claims have not even acknowledged the absence of any language relating to retaliation claims.

II. THE JUDGMENT BELOW WAS CORRECT, BECAUSE THE PLAIN LANGUAGE OF 42 U.S.C. 2000E-2(M) MAKES NO REFERENCE TO RETALIATION CLAIMS.

Tanca's position that 42 U.S.C. § 2000e-2(m) somehow applies to discrimination *and* retaliation claims under Title VII cannot be squared with the plain language of this section, which refers exclusively to discrimination claims:

> **(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices**
>
> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that *race, color, religion, sex, or national origin was a motivating factor* for any employment practice, even though other factors also motivated the practice.

42 U.S.C. § 2000e-2(m) (emphasis added). There is no reason to impose a broad, pro-plaintiff gloss on this provision, when its plain language expressly omits any reference to retaliation claims, and when the background rule of causation in federal employment discrimination law requires a showing of but-for causation to establish liability. *Price Waterhouse v. Hopkins*, 490 U.S. at 244-245 (employer in Title VII discrimination case is excused from liability if employer proves that it would have made same decision regardless of unlawful motive); *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, 287 (1977) (employer in First Amendment retaliation case is excused from liability under same standard).

Moreover, 42 U.S.C. § 2000e-2(m) was added to the section of Title VII that addressed claims of status-based discrimination only. Retaliation claims arise under an entirely separate section of Title VII, at 42 U.S.C. § 2000e-3(a):

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has *opposed any practice made an unlawful employment practice by this subchapter*, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a) (emphasis added). This separate section defining retaliation claims demonstrates that Congress' omission of retaliation claims from 42 U.S.C.§ 2000e-2(m) was deliberate and consistent with the overall statutory structure.

When it has chosen to, Congress has expressly referred to discrimination *and* retaliation claims, both in the 1991 Civil Rights Act and in Title VII prior to 1991. 42 U.S.C. § 1981a(a)(1) (added by Section 102 of the 1991 Act, and providing for compensatory and punitive damages in Title VII "sole-cause" discrimination *and* retaliation claims);[5] 42 U.S.C.

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[5] 42 U.S.C. § 1981a(a)(1) (**"Damages in cases of intentional discrimination in employment"**) provides, in relevant part:

> **(a) Right of recovery**
>
> **(1) Civil rights**
>
> In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act (*42 U.S.C. 2000e-2 or 2000e-3*) and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of

§ 2000e-5(g)(2)(A) (added by 1964 Civil Rights Act and limiting the availability of reinstatement and back pay in Title VII discrimination *and* retaliation claims).[6] Congress' express inclusion of discrimination *and* retaliation claims in these sections supports the conclusion that the omission of retaliation claims from 42 U.S.C. § 2000e-2(m) was deliberate. *Tanca v. Nordberg*, 98 F.3d at 683-684 & n.7, App. 9 (citing *Riess*, 845 F. Supp. at 745). "Where Congress includes particular language in one section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the

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1964, from the respondent.

(emphasis added and in original).

[6] 42 U.S.C. § 2000e-5(g)(2)(A) provides:

> (2)(A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than *discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title*.

(emphasis added).

disparate inclusion or exclusion." *Rodriguez v. United States*, 480 U.S. 522, 525 (1987). Congress' deliberate omission of retaliation claims from 42 U.S.C. § 2000e-2(m) thus left undisturbed this Court's rule, as set forth in *Price Waterhouse v. Hopkins*, 490 U.S. at 244-245, which excuses the employer from Title VII liability if the employer proves that it would have made the same adverse decision regardless of any unlawful motive.

Tanca asserts that the First Circuit's decision, which identifies a different standard of liability for mixed-motive retaliation and discrimination claims under Title VII, somehow departs from the long-established judicial tradition of treating the various federal employment discrimination statutes alike. Petition for Certiorari, at 7. The First Circuit's decision hardly disturbs this tradition, because the First Circuit has merely identified a different standard of liability within a *single* statute, instead of creating a different standard of liability under different statutes. The tradition of uniformity among the related employment discrimination statutes does not address this issue of disuniformity within a single statute. The First Circuit's decision will not create inconsistency among the related anti-discrimination statutes, since each statute may follow Title VII's internal distinction between mixed-motive retaliation and discrimination claims.

The petitioner's reliance on the legislative history of 42 U.S.C. § 2000e-2(m) does not advance his position. Reliance on the legislative history to divine congressional intent is misplaced, because the plain language of the statute, and *not* its legislative history, is the best evidence of Congress's intent, especially where, as here, the plain language is clear and

unambiguous. *Estate of Cowart v. Nicklos Drilling Co.*, 508 U.S. 469, 475 (1992).

Even if the legislative history is considered, it sheds no light on the issue. The legislative history reflects nothing more than bi-partisan compromise, and not the all-encompassing pro-plaintiff approach that Tanca suggests. Nicole L. Gueron, Note, *An Idea Whose Time Has Come: A Comparative Procedural History of the Civil Rights Act of 1960, 1964, and 1991*, 104 Yale L.J. 1201, 1203-1211 (1995). Nowhere does the legislative history address the effect of the *Price Waterhouse* decision on Title VII retaliation claims.[7] The legislative history

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[7] The relevant congressional committee reports show only that the Legislature was concerned that "[t]he effectiveness of Title VII's ban on *discrimination on the basis of race, color, religion, sex or national origin* has been severely undercut by the recent Supreme Court decision in *Price Waterhouse v. Hopkins*." H.R. Report No. 102-40(I) ("H. Rep. I"), 102d Cong., 1st Sess. 45 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 583 (citation and footnote omitted) (emphasis added). The committee reports also show that Congress analyzed the *Price Waterhouse* decision thoroughly and concluded that "[l]egislation is needed to restore Title VII's comprehensive *ban on all impermissible consideration of race, color, religion, sex or national origin in employment*." H. Rep. I at 47-48, reprinted in 1991 U.S.C.C.A.N. at 585-586 (emphasis added and in original). Moreover, in H.R. Rep. No. 102-40(II), 102d Cong., 1st Sess. 16-19 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 709-710, Congress expressly titled the report: "Clarifying Prohibition Against *Impermissible Consideration of Race, Color, Religion, Sex or National Origin* in Employment Practices." H. Rep. II at 16, *reprinted in* 1991 U.S.C.C.A.N.

addresses discrimination claims only and mirrors the omission of retaliation claims in the text of 42 U.S.C. § 2000e-2(m). The legislative history's conspicuous silence on the issue of retaliation claims under Title VII thus defeats Tanca's argument that the First Circuit's decision conflicts with a clear congressional intent, as expressed through the legislative history, to reach retaliation claims under 42 U.S.C. § 2000e-2(m).

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at 709 (emphasis added). The title simply does not refer to retaliation cases.

Conclusion.

For the foregoing reasons, the Court should deny the petition for certiorari.

By their attorneys,

Scott Harshbarger
Attorney General
of Massachusetts

Ben Robbins
BBO# 559918
Douglas H. Wilkins
BBO# 528000
Counsel of Record
BBO# 528000
Assistant Attorneys General
One Ashburton Place
Boston, MA 02108
(617) 727-2200, ext. 2080

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